Filed 8/4/03 P. v. Burnett CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW DOUGLAS BURNETT,

Defendant and Appellant.

F041464

(Super. Ct. Nos. LBF8869 & LBF8773)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Merced County. F. Dougherty, Judge.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, and Carlos A. Martinez, Deputy Attorney General, for Plaintiff and Respondent.

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* Before Dibiaso, Acting P.J., Vartabedian, J., and Harris, J.

Pursuant to a plea agreement, appellant Andrew Burnett pled no contest to two counts of offering false evidence (Pen. Code, § 132),[1] charged in two separate cases, viz. Merced County Superior Court case Nos. LBF8773 (case No. 8773) and LBF8869 (case No. 8869). In case No. 8773, the court imposed a term of eight months, representing one-third of the midterm; ordered that term to run consecutively to a term appellant was serving arising out of convictions in two Santa Clara County cases;[2] and awarded appellant 228 days of presentence credit, consisting of 152 days of actual time credit and 76 days of conduct credit. In case No. 8869, the court imposed a concurrent 16-month lower term and awarded appellant 19 days of presentence credit, consisting of 13 days of actual time credit and 6 days of custody credit. Appellant requested that the court issue a certificate of probable cause (§ 1237.5). The court denied this request.

Appellant's appointed appellate counsel has filed an opening brief which summarizes the pertinent facts, with citations to the record, raises no issues, and asks that this court independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436.)

Appellant, in response to this court's invitation to submit additional briefing, has submitted a brief in which he makes a number of arguments, many of which are based on the claim that in awarding appellant presentence credits in case No. 8773, the court imposed an unauthorized sentence. The factual and procedural background of this claim is as follows:

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1 All statutory references are to the Penal Code unless otherwise indicated.

2 We take judicial notice of the records of the California Sixth District Court of Appeal, which indicate that in 2001, appellant was sentenced to a three-year term in Santa Clara case No. 210631 and a consecutive eight-month term in Santa Clara case No. 196212. (Evid. Code, §§ 452, subd. (d); 459, subd. (a)). Appellant asks that we also take judicial notice of the records in two other pending appeals. These matters are irrelevant in the instant appeal, and therefore we deny appellant's request as to those matters.

Appellant committed the section 132 violations charged in case Nos. 8773 and 8869 in 1999. However, he did not enter his no contest plea to these offenses until December 21, 2001.

In the intervening period he suffered several criminal convictions in Santa Clara County Superior Court, including a conviction of cruelty to animals (§ 597, subd. (b)), in Santa Clara County case No. 210631 in June 2001, and grand theft (§ 487, subd. (b)(3)) in Santa Clara County case No. 196212 in July 2001. Appellant was sentenced to three years on the former case and a consecutive eight-month term on the latter case.

On December 21, 2001, at the outset of the hearing at which appellant entered his plea in the instant case, defense counsel told the court the parties had reached a plea agreement, the terms of which were as follows: appellant would plead no contest to two counts of violating section 132 in case Nos. 8773 and 8869, respectively; in case No. 8773 "[h]e would receive eight months consecutive to what is being served right now at CDC"; in case No. 8869 he would receive a 16-month concurrent sentence; and he would receive presentence credits in case No. 8773 for the period from July 23, 2001, through December 21, 2001. In response to a question from the court, appellant indicated he understood the court would determine presentence credits at a hearing approximately 30 days later at which appellant would not be present. Shortly thereafter, appellant entered his plea and requested immediate sentencing. And shortly after that, the court imposed the agreed-upon prison terms; set a hearing for January 30, 2002, "for receipt of the probation report and fixing credits"; and told appellant "the sheriff will take you back to the State Department of Corrections."

The scheduled hearing was later continued to February 13, 2002. In advance of that hearing, the probation officer prepared two presentence reports. The report for case No. 8869 indicated appellant was entitled to 19 days of presentence credit, consisting of actual time credits of 13 days, for incarceration in Merced County jail from September 15 1999, to September 18, 1999, and from December 12, 2001, to December 21, 2001, and

six days of conduct credits. The report for case No. 8873 indicated only the latter period of incarceration in Merced County, and noted, "[c]redits allocated to [case No. 8869] for custody credits."

At the hearing on February 13, 2002, at which appellant was not present, the court awarded appellant 19 days of presentence credits in case No. 8869 and no presentence credits in case No. 8773. Defense counsel did not object to the court's failure to award the agreed-upon credits.

On September 19, 2002, the court wrote to appellant, stating the following: the court had received appellant's letter of August 22, 2002, "regarding transcripts and credits"; at the February 2002 hearing, the court had erred in failing to award credits for the period of July 23, 2002, through December 21, 2001, in case No. 8773; and "an amended abstract will be prepared reflecting credits of 152 days plus 76 conduct credits."[3] The following day, an abstract of judgment was filed, stating that in addition to the 19 days awarded in case No. 8869, in case No. 8773 the court awarded 228 days of presentence credits, consisting of 152 days of actual time credits and 76 days of conduct credits.[4]

From the foregoing it is apparent that pursuant to the plea agreement, the court awarded appellant presentence credits in case No. 8773 for the period of July 23, 2001, to December 21, 2001, even though appellant was confined in the Merced County jail for only 10 days of that period and he apparently spent a portion of that period in state prison serving the sentence imposed in Santa Clara County case Nos. 210631 and 196212.

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[3] We take judicial notice of this letter, a copy of which is in this court's file. (Evid. Code, §§ 452, subd. (d); 459, subd. (a)). Appellant's letter of August 22, 2002, is not part of the appellate record or this court's file.

[4] The period of July 23, 2001, to December 21, 2001, consists of 152 days, a period which generally entitles a defendant in local custody 76 days of conduct credit under the formula set forth in section 4019.

However, for any portion of appellant's confinement time attributable in whole or in part to his Santa Clara County convictions, whether he served such time in prison or in the Merced County jail, he was not entitled to presentence credit in case No. 8773. (*People v. Bruner* (1995) 9 Cal.4th 1178, 1191 ["a prisoner is not entitled to credit for presentence confinement unless he shows that the conduct which led to his conviction was the sole reason for his loss of liberty during the presentence period"].) Thus, although the record does not reveal the precise dates of appellant's incarceration in state prison, it is apparent that for at least a portion of the period from July 23, 2001, to December 21, 2001, appellant was not entitled to presentence credits in case No. 8773. Therefore, notwithstanding the plea agreement, at least a portion of the credits awarded for that period was not authorized by law.

Based on this premise, appellant makes several claims. His arguments are none too clear, but as best we can determine, he argues as follows:

Appellant contends reversal is required, and he should be allowed to withdraw his plea and be "return[ed] to the position he held prior to the [plea] proceedings," because the court, in awarding him credits to which he was not entitled, (1) acted in "excess of [its] jurisdiction" and (2) violated the plea agreement. For at least two reasons, these arguments fail. First, as indicated above, appellant did not obtain a certificate of probable cause and he entered his plea in return for a specified sentence. On appeal, in the absence of a certificate of probable cause, a defendant may not challenge the validity of his plea. (§ 1237.5; *People v. Panizzon* (1996) 13 Cal.4th 68, 76.) And a challenge to a sentence imposed pursuant to a plea agreement in which a defendant agrees to an imposition of a specified sentence is, in essence, an attack on the validity of the plea. (*Id*. at p. 73.) Therefore, claims that the court imposed an unauthorized sentence claim and violated the plea agreement are foreclosed by the absence of a certificate of probable cause.

Second, "[w]here the defendants have pleaded guilty in return for a specified sentence, appellate courts will not find error even though the trial court acted in excess of

jurisdiction in reaching that figure, so long as the trial court did not lack *fundamental* jurisdiction. The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process." (*People v. Hester* (2000) 22 Cal.4th 290, 295.) Here, as indicated above, appellant pled guilty in exchange for a specified sentence. And, although as appellant asserts, the award of credits in case No. 8773 was " 'an act undertaken "in excess of jurisdiction, i.e. beyond statutory authority," ' " the award of credits was not " 'an act of a trial court undertaken without "jurisdiction in the fundamental sense" (a complete absence of authority with respect to the subject of the dispute) . . . ." ' " (*People v. Jones* (1989) 210 Cal.App.3d 124, 135.)

Appellant contends the rationale underlying the policy discussed above does not apply to him because, he asserts, in challenging his sentence he is not attempting to better his bargain. And, indeed, it appears that appellant is making the unusual complaint that the court awarded him too many days of presentence credit. However, appellant suggests the court's award of credits has worked to his disadvantage because the result has been that the Department of Corrections, which is charged with calculating appellant's postsentence credits, has become "confused" and is unable to provide appellant with a "correct calculation of credits." Although appellant refers here to matters outside the record, it is evident that by raising his unauthorized-sentence claim, appellant seeks to obtain some sort of benefit related to the computation of credits.

In addition, by virtue of the passage of time, appellant could gain some advantage if he is allowed to withdraw his plea and be "return[ed] to the position he occupied" before he entered his plea. As the court stated in *People v. Ellis* (1987) 195 Cal.App.3d 334, "[c]oncerns" about a defendant unfairly manipulating the system by raising an appellate challenge to the very sentence to which he agreed "may arise where the entire bargain is set aside at a late date and the matter is then set for trial. In [that] event, the passage of time will often make it more difficult for the People to carry their burden of

proving the criminal conduct at issue. Although delay does not invariably prejudice a party's ability to prove its case [citation], delays frequently result in the death or disappearance of witnesses, fading memories, and the destruction of evidence." (*Id*. at pp. 345-346, fn. 4.)

Thus, appellant's challenge to his sentence is an attempt to better his bargain through the appellate process. This he may not do. Because appellant agreed to the sentence imposed, he may not challenge it on appeal. (*People v. Hester*, *supra*, 22 Cal.4th at p. 295.)

Appellant also argues that because he entered his plea pursuant to an agreement, one of the terms of which was that the court impose an unauthorized sentence, his plea was "void from the beginning," and therefore invalid. As demonstrated above, however, a challenge to the validity of a plea is not cognizable on appeal where, as here, the court did not issue a certificate of probable cause. (*People v. Panizzon*, supra, 13 Cal.4th at p. 76.)

Appellant also argues that trial counsel provided constitutionally inadequate representation by advising appellant to accept, and/or coercing him into accepting, a disadvantageous and invalid plea agreement. This claim too is barred by the absence of a certificate of probable cause. (*People v. Stubbs* (1998) 61 Cal.App.4th 243 [claim of ineffective assistance of counsel occurring prior to plea went to validity of plea and therefore was not cognizable on appeal in absence of compliance with certificate of probable cause requirements].)

Appellant also contends his right to the effective assistance of counsel was violated in a number of instances after the entry of his plea. First, appellant finds fault with counsel for counsel's failure to object when, at the hearing on the determination of presentence credits on February 13, 2002, the court awarded no credits in case No. 8773. This claim fails because, as indicated above, the court corrected its error and therefore appellant was not prejudiced by counsel's failure to object. (*People v. Maury* (2003) 30

Cal.4th 342, 389 [“[t]o prevail on a claim of ineffective assistance of counsel, a defendant ‘ “must establish not only deficient performance . . . , but also resultant prejudice” ’ ”].)

Next, appellant contends his counsel’s performance was inadequate because counsel “never filed a Notice of Appeal, after being asked . . . .” There is nothing in the record suggesting that counsel ignored a request by appellant to file a notice of appeal, and therefore this claim in not properly before us. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1183 [“our review on a direct appeal is limited to the appellate record”].) And in any event, because a timely notice of appeal was later filed, appellant has again failed to demonstrate prejudice.

Finally, appellant claims counsel, despite “being asked,” failed to “assist” appellant in obtaining a certificate of probable cause. This claim too is based on matters outside the record and is therefore not cognizable on appeal.

In addition to reviewing the claims discussed above, we have independently reviewed the record, and based on that review we have concluded that no reasonably arguable legal or factual issues exist. We decline appellant’s request that we direct counsel to brief the issues appellant has raised.

The judgment is affirmed.